91-1858

No. _____

Supreme Court, U.S.
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In The
Supreme Court of the United States

October Term, 1991

JAMES BOYD and
ELIZABETH BOYD,
Petitioners,

v.

FORD MOTOR COMPANY;
ROUGE STEEL COMPANY;
THE MOTOR VESSEL M.S. HENRY FORD II,
Respondents.

On Appeal from the United States Court of Appeals for the Sixth Circuit

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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January 30, 1992

QUESTIONS PRESENTED FOR REVIEW

I. Whether the condition that a vessel be "in navigation" is a requisite factor in determining "seaman" status pursuant to the Jones Act, 46 U.S.C §688, in light of this Court's holding in *McDermott v. Wilander*, ____ U.S. ____ , 111 S. Ct. 807 (1991).

II. Whether the determination that a vessel was "in navigation" when a cause of action arose, for the purpose of determining Jones Act "seaman status", is a jury question or a question of law.

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No. 91-1285

In The
Supreme Court of the United States

October Term, 1991

JAMES BOYD and
ELIZABETH BOYD,
Petitioners,

v.

FORD MOTOR COMPANY;
ROUGE STEEL COMPANY;
THE MOTOR VESSEL M.S. HENRY FORD II,
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On Appeal from the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

REFERENCE TO OPINIONS BELOW

The opinion of the Court of Appeals below (Appendix A, *infra*, p. A-1) is reported in 948 F.2d 283. The memorandum opinion of the District Court below (Appendix B, *infra*, p. B-1) was not reported.

JURISDICTION

The jurisdiction of this Court is invoked following the entry of an opinion of the United States Court of Appeals for the Sixth Circuit on November 6, 1991, and pursuant to 28 U.S.C. §1254 (1), Petitioners seek this writ of certiorari.

46 U.S.C. §688 — THE JONES ACT

§688. Recovery for Injury to or Death of Seaman

(a) Application of Railway Employee Statutes; Jurisdiction

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action, all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

STATEMENT OF THE CASE

This a case which arises under 46 U.S.C. § 688, known as the Jones Act. This is a case within the original admiralty and maritime jurisdiction of the District Courts of the United States.

Petitioners JAMES and ELIZABETH BOYD apply for certiorari following a decision by the United States Court of Appeals for the Sixth Circuit.

On March 28, 1990, Mr. and Mrs. BOYD filed a Complaint in the district court for the Eastern District of Michigan alleging personal injury to JAMES BOYD caused by negligence on the part of the Respondents, FORD MOTOR COMPANY, ROUGE STEEL COMPANY, and THE MOTOR VESSEL M.S. HENRY FORD II.

The BOYDS claimed remedies under the Jones Act, 46 U.S.C. § 688, contending that JAMES BOYD enjoyed the Jones Act's requisite seaman status on February 11, 1987, the date of his injury.

Petitioners based their contention on these undisputed facts: (1) that JAMES BOYD was well into his third decade as a maritime employee of the Respondents, and (2) that for the past three years, Mr. BOYD had enjoyed a permanent assignment to the MOTOR VESSEL M.S. HENRY FORD II as "Chief Engineer AA" as well as "Chief Maintenance Engineer."

Both the district court and the Sixth Circuit court of Appeals relied on the following facts which are not in dispute:

> (1) The [2-11-87] injury occurred during winter lay-up;
>
> (2) The ship was not sailing and was in fact secured with special "winter lines";
>
> (3) The full crew was not stationed aboard the ship. Only engineers and persons engaged in winter repair work were retained during the winter lay-up;
>
> (4) The plaintiff's classification had changed from Chief Engineer AA to Chief Maintenance Engineer, and his normal sailing season classification had been changed to "temporary winter work classification."
>
> (5) The plaintiff was engaged in winter lay-up mechanical repair work at the time of his injury, either preparing the vessel for winter or readying it for the following season;

(6) The plaintiff did not sleep aboard the vessel during the winter lay-up period;

(7) The vessel's main engine had been completely "torn down" and was not in operable condition at the time of the incident;

(8) The vessel had lost her classification with the U.S. Coast Guard, and could not regain it without an inspection.

Boyd v. Ford Motor Company, 948 F.2d 283, 286 (6th Cir. 1991)

On February 15, 1991, the district court granted summary judgment for the Defendants ruling that JAMES BOYD was not a "seaman" for Jones Act purposes.

The lower court ruled that Respondent THE MOTOR VESSEL M.S. HENRY FORD II was not "in navigation" at the time of Mr. BOYD's injury, and therefore, he did not enjoy seaman status. The lower court also ruled that respondent, THE MOTOR VESSEL M.S. HENRY FORD II was not "in navigation" as a matter of law.

On November 6, 1991, the United States Court of Appeals for the Sixth Circuit affirmed the lower court's ruling.

The court of appeals held that (1) the "in navigation" prong of the "seaman status" test was still operative in spite of its absence in *McDermott v. Wilander*, ____ U.S. ____, 111 S.Ct 807 (1990) and *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959) and that (2) whether a vessel is "in navigation" may be properly decided as a question of law.

Petitioners JAMES and ELIZABETH BOYD argue that *Wilander* and *Robison* both do away with the "in navigation" requirement of the Jones Act seaman status test. Respondents contend that the test still requires that a vessel be "in navigation".

Petitioners argue that even if the "in navigation" requirement is still a prong in the *Wilander/Robison* test for seaman status, it is purely a jury question and in the instant case, a

question of fact remains as to whether the vessel in question was "in navigation" when the cause of action arose. Respondents contend that the "in navigation" requirement is either a question of law or a mixed question of law and fact.

REASONS FOR ALLOWANCE OF THE WRIT

1. Courts of Appeals in conflict

The Sixth Circuit opinion below is inconsistent with the Fifth Circuit's test for Jones Act "seaman status" in *Offshore Co v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959), which is:

> (1) [I]f there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or during anchorage for its future trips. *Robison*, 266 F.2d 769, 779 (5th Cir. 1959)

While the Fifth Circuit does not mention the "in navigation" requirement in the *Robison* test, the Sixth Circuit, in its opinion below holds that this factor — that a vessel be "in navigation" in order that an injured worker be a "seaman" — is dispositive and may be decided as a matter of law.

The Sixth Circuit notes that there is " . . . little in *Robison*, to suggest an abandonment of the [in navigation] requirement."

However, the fact that the Fifth Circuit did not include the "in navigation" prong at all in its test strongly suggests that such a requirement no longer exists.

The Jones Act, infamous for its lack of clarity, does not assist in getting at the definition of "seaman". Plain logic and common sense do not provide any further insight as to the relationship between "vessel status" and "seaman status".

The conflict between the Fifth and the Sixth Circuit is indicative of a lack of uniformity in understanding just what seaman status entails.

2. Conflict with the U.S. Supreme Court in *Wilander*.

a) Is "in navigation" part of the seaman test?

In *Wilander*, this Court adopted the Fifth Circuit's test for Jones Act "seaman status" as set forth in *Robison*, *supra*. *Wilander*, ____ U.S. ____, 111 S.Ct. 807, 817. The Sixth Circuit, in its opinion below, reasoned that because this Court in *Wilander* did not specifically handle the "in navigation" issue, that the requirement is impliedly still a part of the Jones Act "seaman status" test. The Appeals Court reasoned,

> The Supreme Court in *Wilander* considered only the narrow question of whether a person must *aid in the navigation* of a vessel of a vessel to be considered a seaman under the Jones Act. It did not purport to define a "vessel in navigation" or attempt any discussion of the "in navigation" concept. However, its opinion implies that the concept is still a viable component of the test used to determine who is a seaman. *Boyd v. Ford Motor Company*, 948 F.2d 283, 288 (6th Cir. 1991)

As noted above, this Court adopted the *Robison* test in *Wilander*. That test for "seaman status" does not include an "in navigation" prong, however, the Sixth Circuit holds in the opinion below that *Wilander implies* such a requirement.

b) Question of fact or law?

If the "in navigation" requirement does exist by implication in *Wilander*, as held by the lower Court of Appeals for the 6th Circuit, the holdings of *Wilander* state that the factors going to determine "seaman status" are mixed questions of fact and law. *Wilander*, ____ U.S. ____, 111 S.Ct. 807, 818.

In the opinion from the court below, the "in navigation" determination may be made as a question of law. The Sixth Circuit Court of Appeals holds that in certain instances, the Judge may grant Summary Judgment where no reasonable jury could find the vessel to be "in navigation". 948 F.2d 283, 285 (6th Cir. 1991)

In the absence of a statutory definition of "in navigation", there is no clear way of determining Jones Act seaman status. Is a worker precluded from such status and its benefits merely because an engine is "torn down" in the winter? A trier of fact would also be made aware that engines are routinely "torn down" all year round.

Is a worker precluded from Jones Act remedies merely because the vessel on which he worked had less than a full crew and no Coast Guard classification? A trier of fact would know that the Great Lakes are transitable during the winter months and that for many motor vessels, "winter lay-up" means "ready to sail with twenty-four hours notice."

3. Court of Appeals has decided an important question of federal law which has not been, but should be, decided by this Court.

The Sixth Circuit Court of Appeals has ruled that in order for a person to enjoy Jones Act "seaman status", the vessel on which the cause of action arose must be "in navigation". *Boyd v. Ford*, 948 F.2d 283, 288. In essence, the lower court of Appeals has added another formal prong to the *Robison* test.

This Court in *Wilander* recognized the importance of establishing uniformity in the area of maritime litigation, specifically in response to the question, "*who* are seamen?" *Wilander*, at 817. It is this Court, then, which is solely able to determine when and if a third, "in navigation" requirement should be part of the test for "seaman status".

This Court, in *Wilander*, held that the requisites for "seaman status" are questions of fact. *Wilander*, at ____ . If, as the 6th Circuit has held in the opinion below, the "in navigation" prong is still viable, does this Court's decision in *Wilander* indicate that such a requirement be determined at law or by a jury?

CONCLUSION

Is the "in navigation" requirement still viable in the test for Jones Act "seaman status"? The Sixth Circuit answers, "yes," while the Fifth Circuit and this Court rely on a test which does not include an "in navigation" requirement.

Moreover, would "in navigation" be a question of law or fact? The Sixth Circuit indicate that it is a mixed question of law and fact. This Court has held that the two prongs of the *Robison* test are to be determined as questions of fact.

These questions are important to all areas of maritime commerce. Both maritime workers and their employers rely upon uniformity in this area of law and commerce, and therefore, this Honorable Court should grant a Writ of Certiorari in this case.

Respectfully submitted,

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Pursuant to Sixth Circuit Rule 24

No. 91-1285

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

JAMES BOYD and ELIZABETH BOYD,
Plaintiffs-Appellants,

v.

FORD MOTOR COMPANY; ROUGE STEEL COMPANY; THE MOTOR VESSEL MS. HENRY FORD II,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Eastern District of Michigan

Decided and Filed November 6, 1991

Before: MILBURN and SUHRHEINRICH, Circuit Judges; and JORDAN, District Judge*.

MILBURN, Circuit Judge. Pursuant to a stipulation of the parties which resulted in a voluntary dismissal of all remaining claims following the entry of a partial summary judgment in favor of the defendants, the district court entered a final judgment in the case below. Plaintiffs James and Elizabeth Boyd appeal the partial summary

*Honorable Leon Jordan, United States District Judge for the Eastern District of Tennessee, sitting by designation.

judgment in this personal injury action brought under 46 U.S.C. § 688 ("Jones Act") and general maritime law. The principal issue in this case is whether or not THE MOTOR VESSEL MS. HENRY FORD II was a vessel in navigation on February 11, 1987, thereby giving plaintiff James Boyd the status of a seaman under the Jones Act when he allegedly fell and injured himself aboard the vessel. For the reasons that follow, we affirm.

I.

A.

On March 28, 1990, James Boyd and his wife, Elizabeth Boyd, filed a complaint in the district court alleging that James Boyd was injured on four occasions while employed as a seaman by the defendants, the Ford Motor Company, the Rouge Steel Company, and THE MOTOR VESSEL MS. HENRY FORD II. In Count I of their complaint, plaintiffs alleged negligence on the part of the defendants and asserted remedies under the Jones Act. In Count II James Boyd asserted that his injuries were caused by an unsafe dock and the unseaworthiness of the defendant vessel. In Count III James Boyd asserted claims for maintenance and cure with respect to each of his injuries. Additionally, his wife, Elizabeth Boyd, presented a claim for loss of consortium.

The first three of the four injuries alleged by plaintiff James Boyd occurred in 1982, 1984, and 1985. Because these injuries occurred outside the applicable three-year limitations period, the district court granted summary judgment in favor of the defendants as to all the Jones Act and unseaworthiness claims.

Plaintiff James Boyd's fourth injury was alleged to have occurred on February 11, 1987, or within the three-year limitations period for bringing claims under the Jones Act and for unseaworthiness. However, upon determining that the MS. HENRY FORD II was not "in navigation" on February 11, 1987, the district court granted partial

summary judgment on all claims arising out of Mr. Boyd's alleged injury on that date, including the claim for maintenance and cure. With respect to the claims for maintenance and cure based on the alleged injuries in 1982, 1984, and 1985, the district court denied defendants' motion for summary judgment but later dismissed those claims, as earlier stated, on stipulation of the parties and entered a final judgment.

Plaintiffs have not chosen to raise a question concerning the district court's ruling that the claims arising from injuries allegedly sustained in 1982, 1984, and 1985 are time-barred. Accordingly, any issues pertaining to that ruling are considered abandoned on appeal and thus not reviewable. *See First State Bank v. City and County Bank*, 872 F.2d 707, 719 n.5 (6th Cir. 1989); *McMurphy v. City of Flushing*, 802 F.2d 191, 198-99 (6th Cir. 1986). The only ruling of the district court which the plaintiffs have appealed is the granting of partial summary judgment to the defendants on all claims arising from the injuries plaintiff Mr. Boyd allegedly sustained on February 11, 1987.

B.

The underlying facts in this case are not disputed. Within a few days of Christmas, 1986, and before January 1, 1987, THE MOTOR VESSEL MS. HENRY FORD II, a ship in navigation on the Great Lakes, entered port at Dearborn, Michigan, to conclude its sailing season by entering a phase known as "winter lay-up." The vessel was moored to its dock with its normal lines and with additional "winter lines" designed to insure a stronger and more permanent attachment to the dock. Shortly after the ship was moored, the sailing crew, with certain exceptions, was paid off and dismissed.

Plaintiff Boyd, however, with other members of the ship's engineering crew, remained with the vessel to supervise the winter lay-up activities. As of January 8, 1987, plaintiff's employment classification was changed

from Chief Engineer AA to Chief Maintenance Engineer AA, and his monthly salary was reduced from $5,406 per month to $3,460.78 per month, changes reflecting his transfer to "temporary winterwork classification." Rather than sleeping aboard the vessel, plaintiff supervised lay-up work during the day and returned to his home each night. During the five-day winter work week, non-crew personnel came aboard the ship to perform various jobs. The ship itself had lost her classification with the United States Coast Guard and was not permitted to sail again before passing a fit-out inspection. Moreover, the vessel's main engine was disassembled and was not operable at the time of plaintiff's alleged injury. During the period of winter lay-up, only one navigating officer was aboard the ship, and he was almost entirely engaged in supervising repair work.

II.

Summary judgment is appropriate where "there is no genuine issue as to any material fact and . . . the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56. A district court's grant of summary judgment is reviewed de novo. *Pinney Dock and Transp. Co. v. Penn Cent. Corp.*, 838 F.2d 1445, 1472 (6th Cir.), *cert. denied*, 488 U.S. 880 (1988). In its review, this court views all facts and inferences drawn therefrom in the light most favorable to the nonmoving party. *60 Ivy St. Corp. v. Alexander*, 822 F.2d 1432, 1435 (6th Cir. 1987).

The moving party carries the burden in showing that no genuine issue of material fact exists. *Id.* Yet, in the face of a summary judgment motion, the nonmoving party cannot rest on its pleadings, but must come forward with some probative evidence to support its claim and make it necessary to resolve the differences at trial. *Celotex Corp v. Catrett*, 477 U.S. 317, 324 (1986). "By its very terms, this standard provides that the mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary

judgment; the requirement is that there be no *genuine* issue of *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247-48 (1986). The dispute must be genuine, and the facts must be such that, if they were proven at trial, a reasonable jury could return a verdict for the nonmoving party. *60 Ivy St. Corp.*, 822 F.2d at 1435. If the disputed evidence "is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249-50 (citations omitted).

The district court granted summary judgment in favor of defendants because, based on the undisputed facts, it found that "no reasonable jury could find that the SS Henry Ford II (sic) was 'in navigation' on February 11, 1987." The "in navigation" requirement comes from this court's definition of a seaman.

> Although the [Jones] Act does not define the term 'seaman', the Sixth Circuit has stated that in determining whether a particular employee is a 'seaman' the following test shall be applied: (1) Is the vessel in navigation, (2) does the employee have a more or less permanent connection with the vessel, and (3) was the employee on board the vessel primarily in aid of navigation?[1]

Searcy v. E.T. Slider, Inc., 679 F.2d 614, 616 (6th Cir. 1982). Under this court's test, a person must be more or less permanently connected with a vessel in navigation in order to fit the definition of a seaman within the Jones Act.

As earlier indicated, the district court found the following undisputed facts:

---

[1]The third element in the definition of a seaman was rejected in *McDermott Int'l, Inc. v. Wilander*, ____ U.S. _____, 111 S. Ct. 807 (1991). See *infra*.

(1) The [2-11-87] injury occurred during winter lay-up;

(2) The ship was not sailing and was in fact secured with special "winter lines";

(3) The full crew was not stationed aboard the ship. Only engineers and persons engaged in winter repair work were retained during the winter lay-up;

(4) The plaintiff's classification had changed from Chief Engineer AA to Chief Maintenance Engineer, and his normal sailing season classification had been changed to "temporary winter work classification."

(5) The plaintiff was engaged in winter lay-up mechanical repair work at the time of his injury, either preparing the vessel for winter or readying it for the following season;

(6) The plaintiff did not sleep aboard the vessel during the winter lay-up period;

(7) The vessel's main engine had been completely "torn down" and was not in operable condition at the time of the incident;

(8) The vessel had lost her classification with the U.S. Coast Guard, and could not regain it without an inspection.

From these undisputed facts, the district court concluded that there were no genuine issues of material fact in this case, and it determined that the ship was not in navigation at the time of plaintiff's alleged injury on February 11, 1987. Accordingly, it held that plaintiff Boyd was not a seaman within the meaning of the Jones Act.

The district court relied primarily on *Antus v.*

Interocean S.S. Co., 108 F.2d 185 (6th Cir. 1939), and *Nelson v. Greene Line Steamers*, 255 F.2d 31 (6th Cir.), *cert. denied*, 358 U.S. 867 (1958). In *Antus*, a case factually similar to this case, the ship in question

> had been withdrawn from navigation. All of the navigating officers and deck crew of the vessel had departed for the winter excepting certain members of the engineer's department, including appellant. All of these men had formerly been members of the crew, but had been paid off after the last trip and had remained on board, in accord with the general practice on the lakes, for the purpose of laying up the vessel. During the navigation season they had been paid on a monthly basis, but in the laying-up work they were paid by the hour, the rate of compensation, however being the same.

Antus, 108 F.2d at 186. The district court had dismissed the plaintiff's action under the Jones Act, and this court affirmed for the reason that,

> [w]hile the work done had direct relation to navigation, it neither was performed *during the navigation season*, nor was it even preparatory to navigation. Appellant was laying up the engine and packing the pumps and seacocks so that they would not freeze. He was taking bolts out of the piston-heads, an operation which was never done during navigation. It would have taken from four to eight hours to put the engines together again to operate. The vessel, while not consigned to a ship's graveyard, was tied up to the piles. Instead of doing this work in preparation for navigation, the men were preparing the vessel for winter quarters. Appellant was not subjected to any maritime hazards.

Id. at 187 (emphasis added).

In *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187

(1952), the Supreme Court followed *Antus* and held that a crew member, reemployed as a laborer for the winter to perform seasonal repair work, was not a seaman within the meaning of the Jones Act because all the vessels upon which he had served had been "laid up for the winter" at the time of his accident. *Id.*, 342 U.S. at 191. The Court cited *Antus* for the proposition that "one who had been a member of a ship's crew and was injured while preparing it for winter quarters could not maintain a Jones Act suit for his injuries . . . ." *Id.* Although neither *Antus* nor *Desper* concentrated on the "in navigation" requirement, both courts emphasized the fact that no vessel was engaged in navigation when the injuries occurred because the vessels had been laid up for the winter. Thus, although both cases actually focused on the kind of work being performed by the plaintiff at the time of his injury or death, *Antus* and *Desper* established that a crew member who is specially reemployed to perform winter lay-up services on a vessel is not a seaman for Jones Act purposes.

This view was reenforced in *Nelson v. Greene Line Steamers*, 255 F.2d 31 (6th Cir.), *cert. denied*, 358 U.S. 867 (1958), a case in which this court affirmed a district court's findings that the Delta Queen had been tied up for the winter at a wharf in Cincinnati, Ohio, and was not engaged in navigation at the time of the plaintiff's intestate's death. Plaintiff had been a crew member during the preceding sailing season, but he was reemployed during the winter as a laborer to make necessary repairs to the ship for the following season. During this lay-up period, the full crew was not aboard, and such crewmen as were working were not required to sleep on the ship. This court refused to find clearly erroneous the district court's findings that the Delta Queen was not in navigation and that the plaintiff, therefore, was not a seaman.

Together the foregoing cases may be considered to have established a special status in which a vessel is laid up for refitting during the winter months. In *Bodden v.*

Coordinated Caribbean Transp., Inc., 369 F.2d 273, 275 (5th Cir. 1966), the Fifth Circuit recognized winter quarters as such a special status in which a ship would not be considered to be in navigation.

> On the other hand, where a vessel is laid up for the winter, the crew having been discharged, and the boat is being secured by workmen paid at an hourly rate and living ashore, the ship is no longer in navigation. The same is true where the vessel is tied up for the winter with only a maintenance crew, and claimant, a crew member during the season, is retained as a laborer on an hourly basis and is not required to live aboard the vessel.

Id. (citation omitted) (citing *Nelson* and *Antus*).

Although plaintiff James Boyd does not dispute the underlying facts and, moreover, concedes in his brief that the vessel, during winter lay-up, "did not have a *pre-scheduled* itinerary of necessary sailing missions," Brief of Appellant at 10-11, he contends that the vessel was in navigation at the time of his injury and that the district court took too narrow a view of the "in navigation" component of the definition of a seaman. He argues that courts should give a liberal interpretation to remedial legislation such as the Jones Act, *Luckett v. Continental Engineering Co.*, 649 F.2d 441, 443-44 (6th Cir. 1981), and contends that because our case, *Noack v. American Steamship Co.*, 491 F.2d 937, 939 (6th Cir. 1974), holds that "the question of 'in navigation' is properly one of fact . . . ," the district court should not have granted summary judgment.

The facts in *Noack* are similar to the facts in this case. In *Noack*, the plaintiff had been a crewman of the vessel in question for twenty-five years and during the sailing seasons was employed as "a wiper"; *i.e.*, one who wipes up grease and oil from the decks of a vessel. He was injured while helping to clean the bilges during winter lay-up, and a jury awarded him a substantial verdict after

finding by special interrogatory that the vessel in question was in navigation. This court upheld the jury verdict in *Noack* stating:

> It is of course true that in the strict sense the lay-up of this Great Lakes vessel effectively took the vessel *out of navigation*. However, it is also true that the routine of lay-up had been established because the vessels could not operate in the ice and cold. Barring such weather obstacles to a year-round sailing season, it appears that many tasks typically accomplished during the lay-up period could well be accomplished at sea without interruption to regular scheduling for major repairs. Thus under the circumstances it seems clear that the lay-up and fit-out activities are complete parts of the total Great Lakes sailing season. Crew members perform the lay-up and fit-out tasks under the same labor contract that applies during the sailing season. The same discipline and functional management also applies. In view of these facts, *we cannot say that there was clear error* in the District Court's finding . . .

Id. at 940 (emphasis added).

In reaching this conclusion, this court found *Butler v. Whiteman*, 356 U.S. 271 (1958), to be controlling. In *Butler*, a brief per curiam, the Supreme Court reversed and remanded a case after finding that the "evidence presented an evidentiary basis for jury findings as to (1) whether or not the tug G.W. Whiteman was in navigation . . . ." *Id.* The majority did not mention the facts of the case or explain its reasoning, but the dissent recited that the tug on which the injury occurred was inoperable, that it had been withdrawn from navigation, that it was moored up, that it had neither captain nor crew, that it was undergoing rehabilitation preparatory to a Coast Guard inspection, and that the decedent in the case was employed as a laborer doing odd jobs around the wharf where the tug was moored. *Butler* thus seems to hold that

there are virtually no circumstances under which a trial court would be justified in directing a verdict on the question of whether or not a vessel was in navigation. It is not surprising, therefore, that this court in *Noack*, confronted with *Butler* and with a standing jury verdict based on special interrogatories, held that there was no clear error in the trial despite the fact that "in the strict sense the . . . vessel [was] out of navigation." *Noack*, 491 F.2d at 940.

In the present case we are not faced with the same situation that was before this court in *Noack*. First, the case comes to this court on appeal from the granting of defendants' motion for summary judgment, not from a jury verdict in favor of the plaintiffs. Second, a recent decision of the Supreme Court has weakened *Butler*, and thus *Noack*, which followed *Butler*.

In *McDermott Int'l, Inc. v. Wilander*, ____ U.S. _____, 111 S. Ct. 807 (1991), the Court reviewed a Fifth Circuit case and affirmed that circuit in its view that one need not *aid in the navigation* of a vessel in order to qualify as a seaman under the Jones Act. The Supreme Court has thus rejected the third factor of the test used in *Searcy v. E.T. Slider, Inc.*, 679 F.2d 614, 616 (6th Cir. 1982), and has approved the Fifth Circuit's test from *Offshore Co. v. Robison*, 266 F.2d 769, 779 (5th Cir. 1959), a test which asks two questions:

> (1) [I]f there is evidence that the injured workman was assigned permanently to a vessel . . . or performed a substantial part of his work on the vessel; and (2) if the capacity in which he was employed or the duties which he performed contributed to the function of the vessel or to the accomplishment of its mission, or to the operation or welfare of the vessel in terms of its maintenance during its movement or *during anchorage for its future trips*.

(Emphasis added).

The Supreme Court in *McDermott* considered only the narrow question of whether a person must *aid in the navigation* of a vessel to be considered a seaman under the Jones Act. It did not purport to define a "vessel in navigation" or attempt any discussion of the "in navigation" concept. However, its opinion implies that the concept is still a viable component of the test used to determine who is a seaman.

> We believe the better rule is to define 'master or member of a crew' under the LHWCA, and therefore 'seaman' under the Jones Act, solely in terms of the employee's connection to a *vessel in navigation*.
>
> . . . .
>
> The key to seaman status is employment-related connection to a *vessel in navigation*.

McDermott, 111 S. Ct. at 817 (emphasis added).

Although the Supreme Court adopted the test set out by the Fifth Circuit in *Robison*, this does not aid the plaintiffs in obtaining a reversal in this court because, as has been pointed out, the Supreme Court did not abandon the "in navigation" requirement. Moreover, there is little in *Robison* to suggest abandonment of the requirement. First, the "in navigation" requirement was not discussed in the case. The language "during its movement or during anchorage for its future trips" does not distinguish between a vessel temporarily anchored while on a voyage and a ship, such as the MS. HENRY FORD II, without crew, without sailing certificates, without operable engines, and without a sailing itinerary or current sailing mission. Thus, neither *Robison* nor *McDermott* supports plaintiffs' contentions that the "in navigation" requirement has been weakened or abandoned. Because the district court's resolution of this case turned only on the issue of the ship's status at the time of plaintiff's injury, and because this issue is independent of the issues discussed in

Robison and *McDermott* -- whether or not plaintiffs were members of a crew -- this court need not decide in this case whether to replace entirely *Searcy's* definition of seaman under the Jones Act.

McDermott also provides important guidance for the resolution of this case insofar as it specifically approves the use of summary judgment in Jones Act cases and therefore relaxes what seemed to be a rigid rule in *Butler*, a case that had been read to hold that jury determinations were required in all aspects of Jones Act cases. Noting that some of its older cases had said that seaman status under the Jones Act was a question of fact for the jury, the Court in *McDermott* stated that the question of who is a seaman is best characterized as a mixed question of law and fact and that, because seaman is a statutory term, its definition is a question of law. It went on to state:

> The jury finds the facts and, in these cases, applies the legal standard, but the court must not abdicate its duty to determine if there is a reasonable basis to support the jury's conclusion . . . . The inquiry into seaman status is of necessity fact-specific; it will depend on the nature of the vessel, and the employee's precise relation to it. *Nonetheless, summary judgment or a directed verdict is mandated where the facts and the law will reasonably support only one conclusion.*

Id. at 818 (citations omitted) (emphasis added).

In this case, the facts pertinent to the determination of whether the MS. HENRY FORD II was in navigation were undisputed, and the question of whether the ship was in navigation was therefore appropriate for summary judgment, especially so after the Supreme Court's trilogy in 1986 dealing with summary judgments. This court's cases, as the district court correctly noted, have held that a ship in winter lay-up without its regular crew, without Coast Guard certification to sail, and without its engines in operating condition, is not in navigation. The cases

cited by plaintiffs provide no reason for this court to change its view that a winter lay-up of the kind described in this case takes a vessel out of navigation and renders those employed upon her ineligible as non-seamen to proceed under the Jones Act.

III.

For the foregoing reasons, the judgment of the district court is AFFIRMED.

RECEIVED JAN. 4, 1991
LEVINE, BENJAMIN

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

JAMES BOYD and
ELIZABETH BOYD,
Plaintiffs,

vs.

THE FORD MOTOR COMPANY,
THE ROUGE STEEL COMPANY and
THE MOTOR VESSEL MS HENRY
FORD II,
Defendants.

Civil Action No.
90-CV-70847-DT

HON. BERNARD A. FRIEDMAN

MEMORANDUM OPINION AND ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

This matter is presently before the court on defendants' motion for summary judgment, filed November 1, 1990. Plaintiffs have filed a response and defendants have filed a reply. Pursuant to Local Rule 17(1)(2) of the United States District Court for the Eastern District of Michigan, the court shall decide this motion without an oral hearing. Accordingly, the January 31, 1991, hearing date indicated on defendants' re-notice of hearing dated November 21, 1990, is cancelled.

Background

The complaint alleges that plaintiff James Boyd was injured on four occasions while working for defendants. The first

injury allegedly occurred on June 16, 1982, when plaintiff fell on pellets "which had been spilled on the dock . . ." At that time, plaintiff "was employed by the defendants as a first assistant engineer [and] was returning to the vessel" when he fell. Plaintiff alleges that on this occasion he injured his hip, knee and right hand. Complaint, para. 7. *See also id.* para. 23.

Plaintiff was injured a second time on December 16, 1984, when he again fell on pellets on a dock. At that time, plaintiff was "continuing his employment with the defendants, and performing his duties leaving the vessel . . ." On this occasion plaintiff allegedly "re-injured his hip, back, neck, both knees, and . . . right shoulder . . ." *Id.* para. 9. *See also id.* para. 24.

The third injury occurred on June 5, 1985, when plaintiff "while working in the crankcase of the main engine of the defendant, THE MOTOR VESSEL MS HENRY FORD II, . . . fell in the crankcase . . ." In this fall plaintiff "re-injur[ed] his hip, shoulder, back, neck, both knees, and . . . right ear and head . . ." *Id.* para. 11. *See also id.* para. 25.

On February 11, 1987, plaintiff was injured a fourth time when "while inspecting a cargo-hold, plaintiff . . . fell on fine coal dust." In this incident plaintiff "re-injured his hip, back, neck, right knee and . . . right shoulder . . ." *Id.* para. 13. *See also* para. 26.

Plaintiff James Boyd alleges that each of these injuries was proximately caused by defendants' negligent failure to properly maintain the vessel and surrounding area. He seeks damages for lost earnings, medical expenses, and pain and suffering. His wife, plaintiff Elizabeth Boyd, asserts a claim for loss of consortium. The negligence claims presented in Court I are brought under the Jones Act, 46 U.S.C. § 688. Count II asserts claims of an unsafe dock and unseaworthy vessel. County III asserts a claim for failure to provide maintenance and cure.

Summary Judgment Standard

Under Fed. R. Civ. P. 56(c), summary judgment is appropriate if

> the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

The burden is on the party opposing summary judgment to "set forth specific facts showing that there is a genuine issue for trial." Fed. R. Civ. P. 56(e). "[T]he mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* dispute as to any *material* fact." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48 (1986) (emphasis in original). Viewing the evidence "in the light most favorable to the opposing party," *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970), summary judgment should be entered only if the evidence is so one-sided that a reasonable fact-finder could not find for the opposing party. *See, e.g., Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248-50 (1986); *Street v. J. C. Bradford & Co.*, 886 F.2d 1472, 1478–80 (6th Cir. 1989).

Defendants' Summary Judgment Motion

A.

In their summary judgment motion, defendants first argue that the statute of limitations has run with respect to the first three incidents (6-16-82, 12-16-84 and 6-5-85). The Jones Act claims are subject to a three-year limitations period. *See McAllister v. Magnolia Petroleum Co.*, 357 U.S. 221, 225 n.6 (1958) (noting that the Jones Act incorporates the three-year limitations period of the Federal Employers' Liability Act, 45 U.S.C. § 56); *Albertson v. T. J. Stevenson & Co., Inc.*,

749 F.2d 223, 228 (5th Cir. 1984). Unseaworthiness claims are governed by the three-year limitations period of 46 U.S.C. § 763a. *See Cooper v. Diamond M Co.*, 799 F.2d 176, 178 (5th Cir. 1986), *cert. denied* 107 S. Ct. 2177 (1987) (applying the three-year limitations period of 46 U.S.C. § 763a to a steward's unseaworthiness claim); M. Norris, *The Law of Seamen* § 27:22, p. 248 (1985).

Claims for maintenance and cure are not subject to the three-year limitations period of the Jones Act or 46 U.S.C. § 763a, but are limited by the doctrine of latches. *See Clauson v. Smith*, 823 F.2d 660, 661 n.1 (1st Cir. 1987); *Reed v. American Steamship Co.*, 682 F. Supp. 333, 335–38 (E.D. Mich. 1988); Norris, *The Law of Seamen* § 26:43, pp. 117–18.

The complaint in this matter was filed on March 28, 1990. This filing took place four years, nine months after the 6-5-85 injury; five years, three months after the 12-16-84 injury; and seven years, nine months after the 6-16-82 injury — substantially beyond the three-year limitations period in each instance. Since plaintiffs have made no showing[1] as to why the statute of limitations should be deemed tolled or otherwise inapplicable, the court shall grant summary judgment for defendant on the Jones Act and unseaworthiness claims arising from these incidents.

The court expresses no opinion as to whether the doctrine of latches bars the maintenance and cure claims arising from these first three incidents. In their summary judgment motion, defendants argue that maintenance and cure claims are subject to the three-year limitations period of the Jones Act or 46 U.S.C. § 763a. The court disagrees with defendants' position and adopts, instead, the conclusion reached by Judge

[1] As noted above, Fed. R. Civ. P. 56(e) requires plaintiffs to "set forth specific facts showing that there is a genuine issue for trial." In their response to defendants' motion, plaintiffs do not address the statute of limitations arguments at all. Plaintiffs have therefore failed to meet their burden under Rule 56(e).

Freeman in *Reed v. American Steamship Co.*, *supra*, that maintenance and cure claims are limited by the doctrine of latches, not by a statutory limitations period.

Defendants have not argued, and the court may not at this point assume, that the doctrine of latches bars plaintiffs' maintenance and cure claims. Accordingly, the court shall deny defendants' motion insofar as it seeks summary judgment as to these claims. Defendants are free, of course, to file another motion (prior to the motion cutoff date) seeking summary judgment based on latches.

B.

Defendants next argue that plaintiffs' claims arising from the February 11, 1987, incident are barred because at that time the MS Henry Ford II was not "in navigation" and, therefore, plaintiff James Boyd was not a "seaman." Plaintiff concedes that these claims are barred if at the time of his injury he was not a "seaman" within the meaning of 46 U.S.C. § 488,[2] but he maintains that he so qualifies.

The Sixth Circuit has stated:

> In an action by an injured employee to recover damages under the Jones Act, the test to be applied in determining whether the employee is a "seaman" within the meaning of the Act is (1) that the vessel be in navigation, (2) that there be more or less permanent connection with the vessel, and (3) that the worker be aboard primarily to aid in navigation.

Nelson v. Greene Line Steamers, 255 F.2d 31, 33–34 (6th Cir. 1958), *cert. denied* 358 U.S. 867 (1958). This three-part test was reaffirmed in *Noack v. American Steamship Co.*, 491 F.2d 937, 938-39 (6th Cir. 1974), and, more recently, in *Searcy v. E. T. Slider, Inc.*, 679 F.2d 614, 616 (6th Cir. 1982).

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[2] The Jones Act, 46 U.S.C. § 688, permits "[a]ny *seaman* who shall suffer personal injury in the course of his employment [to] maintain an action for damages at law" (Emphasis added.)

Defendants argue that the ship on which plaintiff was working, the MS Henry Ford II, was not "in navigation" on February 11, 1987. Defendants' recitation of the following facts is not disputed by plaintiff:

> 1) The [2-11-87] injury occurred during winter lay-up;
>
> 2) The ship was not sailing and was in fact secured with special "winter lines";
>
> 3) The full crew was not stationed aboard the ship. Only engineers and persons engaged in winter repair work were retained during the winter lay-up;
>
> 4) The plaintiff's classification had changed from Chief Engineer AA to Chief Maintenance Engineer, and his normal sailing season classification had been changed to "temporary winter work classification." . . .
>
> 5) The plaintiff was engaged in winter lay-up mechanical repair work at the time of his injury, either preparing the vessel for winter or readying it for the following season;
>
> 6) The plaintiff did not sleep aboard the vessel during the winter lay-up period;
>
> 7) The vessel's main engine had been completely "torn down" and was not in operable condition at the time of the incident;[3]
>
> 8) The vessel had lost her classification with the U.S. Coast Guard, and could not regain it without an inspection.

Defendants' Brief, pp. 18–19. As plaintiffs do not dispute these facts, the court may take them as established.

Similar circumstances were present in *Antus v. Interocean S. S. Co.*, 108 F.2d 185 (6th Cir. 1939). In *Antus*, plaintiff

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[3] At page 19 of this deposition, plaintiff testified that he did not know whether the main engine was operable on February 11, 1987. At pages 21–22, however, he indicated that the Coast Guard would not have permitted the ship to sail on that date because, among other things, the "[m]ain engine would not run."

was injured while cleaning the bilges of a Great Lakes steamer. At the time of the injury, the ship was in winter layup.

> All of the navigating officers and deck crew of the vessel had departed for the winter excepting certain members of the engineer's department, including appellant.
>
> ° ° °
>
> At the time of the accident appellant's work consisted of overhauling the engines, removing bolts from cylinder-heads and chests, cleaning bilges, and performing similar operations, all of which the District Court held had a direct relation to navigation and commerce.

108 F.2d at 186. The district court found that plaintiff was not a "seaman" and dismissed his Jones Act complaint. *Id.* In affirming, the Sixth Circuit stated:

> [T]he question is whether at the time of the accident he was engaged in maritime work, and the test is the nature of his employment at the time. While the work done had direct relation to navigation, it neither was performed during the navigation season, nor was it even preparatory to navigation. Appellant was laying up the engine and packing the pumps and seacocks so that they would not freeze. He was taking bolts out of the piston-heads, an operation which was never done during navigation. It would have taken from four to eight hours to put the engines together again to operate.[1] The vessel, while not consigned to a ship's graveyard, was tied up to the piles. Instead of doing this work in preparation for navigation, the men were preparing the vessel for winter quarters. Appellant was not subjected to any maritime hazards. The fact that he had been, or expected in the future to be, a seaman does not render

[1] At pages 18–19 of his deposition, plaintiff testified that the main engine which had been "torn down" could be made operational within 12 to 24 hours after being reassembled.

> maritime work which was not maritime in its nature. The finding of the District Court upon this point was correct, and appellant was not at the time of his injury a seaman.

108 F.2d at 187.[5]

The same result was reached in *Nelson v. Greene Line Steamers, Inc.*, 255 F.2d 31 (6th Cir. 1958. In *Nelson*, plaintiff's decedent was a deck hand on a Mississippi excursion steamer. The vessel made its last excursion of the year in early November, following which "it was tied up for the winter . . ." 255 F.2d at 32. Plaintiff's decedent, who lived on the vessel during the sailing season, was employed during the winter as a "laborer[ ] for the purpose of making necessary repairs to the vessel and getting her ready for the following season." *Id.* at 33. Additionally,

> After the boat was tied up the appellee only had on the boat such persons as could be used to ready the ship for the use the following spring. The full crew was not retained. The pilots were not on board, nor the steward's crew or maids, nor all of the deck hands, cooks, chefs or pantry men. The engineers and their helpers were on board making repairs on the machinery and boilers.

Id. Plaintiff's decedent fell overboard while working on the paddle wheel and drowned. The Sixth Circuit affirmed the district court's determination, on a motion to dismiss, that the vessel was not in navigation and that plaintiff's decedent was not a seaman within the meaning of the Jones Act. 108 F.2d at 35.

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[5] *Antus* was later cited with approval by the Supreme Court in *Desper v. Starved Rock Ferry Co.*, 342 U.S. 187, 191 (1951). In *Desper*, the court suggested that a ship is not "in navigation" if it is in winter lay up. *Id.* *See also* Martin, *The Law of Seamen* § 2:8, p. 53 (1985) (citing cases for the proposition that "a ship is not in navigation when she has been laid up for the winter").

"The question of seaman status within the meaning of the Jones Act is generally a question of fact to be decided by the jury." *Searcy v. E. T. Slider, Inc.*, 679 F.2d 614, 616 (6th Cir. 1982), *citing Luckett v. Continental Engineering Co.*, 649 F.2d 441, 443 (6th Cir. 1981). Where, however, the material facts are not disputed, the court may make this determination on summary judgment. *See, e.g., Antus v. Interocean S. S. Co.* and *Nelson v. Greene Line Steamers, Inc.*, *supra*.

Based on the undisputed facts in this case the court believes no reasonable jury could find that the SS Henry Ford II was "in navigation" on February 11, 1987. As noted above, the parties agree that the vessel was in winter lay up at that time. At pages 7–8 of his deposition, plaintiff testified that the ship had been in this state since approximately Christmas 1986. Although the ship was in the water, it was secured to the dock with winter lines. *Id.* at 14. Plaintiff testified that the main engine was "completely torn down" during the lay up period. *Id.* at 18. Plaintiff also testified that he was not living on the ship during the winter lay up, but commuted to work from Trenton, Michigan. *Id.* at 15–16. Plaintiff indicated that the vessel could not have sailed on February 11, 1987, because there was no crew aboard, the life-saving equipment was not out, and the main engine would not run. *Id.* at 21–22.

Plaintiff has not cited a single case from this circuit which would permit a jury to find that a vessel in this condition is "in navigation" within the meaning of the Jones Act. Based on the cases cited above, the court believes that no reasonable jury could make such a finding. Accordingly, the court shall grant summary judgment for defendants with respect to the February 11, 1987, injury.

Conclusion

For the reasons stated above,

IT IS ORDERED that defendants' motion for summary judgment is granted as to the Jones Act and unseaworthiness claims arising from the injuries plaintiff James Boyd sustained

on June 16, 1982; December 16, 1984; and June 5, 1985. Defendants' motion is denied without prejudice as to the maintenance and cure claims arising from these injuries.

IT IS FURTHER ORDERED that defendants' motion for summary judgment is granted as to all claims arising from the injuries plaintiff James Boyd sustained on February 11, 1987.

SO ORDERED.

/s/ BERNARD A. FRIEDMAN
Bernard A. Friedman
United States District Judge

Dated: Jan. 03, 1991
Detroit, Michigan